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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 118

FOX FILM CORPORATION, APPELLANT

v.

PAUL H. DOYAL, STATE TAX COMMISSIONER, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR APPELLEE

GEORGE M. NAPIER,
Attorney General of Georgia.
ORVILLE A. PARK,
HARRY S. STROZIER,
J. A. SMITH,
Solicitors for Appellee.

ORVILLE A. PARK,
Of Counsel.

INDEX AND SUMMARY OF THE ARGUMENT

Page

STATEMENT OF THE CASE 1

BRIEF OF THE ARGUMENT 3

I.

THE IMMUNITY OF FEDERAL INSTRUMENTALITIES FROM STATE TAXATION MUST BE GIVEN SUCH A PRACTICAL CONSTRUCTION AS WILL NOT UNDULY RESTRICT THE POWER OF THE STATE GOVERNMENT IMPOSING THE TAX 3

(1) This is necessary

(a) Because of the vast increase in the number and amount of such instrumentalities 4

(b) Because of the necessity of adopting new and different methods of taxation consonant with present conditions 5

(2) The decisions of this Court limit the doctrine of the exemption of government instrumentalities to those essential to the exercise of sovereign powers 6

(3) The Indian land cases are exceptional 13

II.

ROYALTIES FROM COPYRIGHTS, IF INSTRUMENTALITIES OF THE UNITED STATES AT ALL, ARE SUCH ONLY IN A QUALIFIED SENSE, DIFFERING FUNDAMENTALLY FROM SUCH INSTRUMENTALITIES AS GOVERNMENT BONDS OR THE SALARIES OF GOVERNMENT OFFICIALS 16

(1) The government's interest in a copyright is not direct as it is in federal securities. A copyright granted for the benefit of the author 16

(2) The franchise secured to an author by a copyright is the privilege of excluding others from "making, using or vending" the production 17
(3) Royalties for use of a copyright arise out of the contract between the owner of the copyright and the licensee; not from the copyright itself 19

III.

LONG v. ROCKWOOD (1928), 277 U. S. 142, 72 L. ed. 824 22
(1) This is the only case holding patents and copyrights are instrumentalities of the United States 22
(2) Copyrights are not exempt from State taxation by reason of their federal origin unless such taxation interferes with sovereign powers of the United States 23
(3) Tax on royalties is on income from private contract; not on franchise granted by the government 25
(2) It is so construed by Georgia court 31
(4) Are patents and copyrights, which are private property, exempt from state taxation? —Dissenting opinion by Mr. Justice Holmes 26
(5) Rockwood case holds only that royalties are exempt from direct tax 28

IV.

EDUCATIONAL FILMS CORP. v. WARD, (1931), 282 U. S. 379, 75 L. ed. 400 29
(1) Case does not decide whether royalties from copyrights are federal instrumentalities 29
(2) Reaffirms Flint v. Stone Tracy Co. 29
(3) Holds that franchise tax measured by net income which includes income from copyrights is valid 30

V.

THE TAX IMPOSED BY THE GEORGIA ACT OF 1929 IS AN EXCISE TAX UPON THE PRIVILEGE OF ENGAGING IN CERTAIN OCCUPATIONS AND UPON CERTAIN BUSINESS AND COMMERCIAL TRANSACTIONS. IT IS A PRIVILEGE OR OCCUPATION TAX MEASURED BY GROSS RECEIPTS 30

(1) This is legislative intent as shown by language used 31

VI.

THE STATES MAY LAWFULLY IMPOSE AN EXCISE TAX UPON THE PRIVIEGE OF DOING BUSINESS WITHIN THE STATE EVEN THOUGH THERE BE INCLUDED IN THE MEASURE OF THE VALUE OF SUCH PRIVILEGE INSTRUMENTALITIES OR INCOME WHICH ARE EXEMPT FROM DIRECT TAXATION 32

(1) Cases so holding briefly reviewed 32

(2) Apparent conflict in cases results from failure to keep in mind distinction between direct tax on property or income and franchise or privilege tax 34

(3) Taxes challenged in Northwestern Mutual Life Ins. Co. v. Wisconsin and Macallen v. Massachusetts were held to be direct taxes on exempt securities 35

VII.

THAT THE TAX IS MEASURED BY GROSS RECEIPTS RATHER THAN BY NET INCOME DOES NOT CHANGE THE NATURE OF THE TAX OR MAKE IT A DIRECT TAX ON AN INSTRUMENTALITY OF THE UNITED STATES.. 37

(1) If tax is imposed on legitimate subject of state taxation state is unrestricted in the choice of methods for its measurement..... 39

(2) Franchise tax measured by gross receipts has been expressly recognized by the Court 39
(3) The cases holding that gross receipts from interstate commerce cannot be taxed were cases where such receipts were directly taxed 39
(4) Other forms of excise tax measured by gross value have been upheld.—Cases cited 41

VIII.

THE TAX IN QUESTION IN FORM, EFFECT, AND OPERATION IS WHAT IT PURPORTS TO BE—A BUSINESS TAX, AN EXCISE ON THE PRIVILEGE OF ENGAGING IN BUSINESS WITHIN THE STATE. THERE WAS NO PURPOSE TO TAX INSTRUMENTALITIES OF THE UNITED STATES 42
(1) There is nothing in the Act to indicate a purpose other or different from that expressed 43
(2) There was no purpose to tax copyrights or royalties from copyrights 43
(3) The effect upon them is casual, incidental, and remote 46

IX.

CONCLUSION 47
(1) Royalties from copyrights are not such instrumentalities as are immune from state taxation 47
(2) But if they can be so regarded, the Georgia occupation or privilege tax on "doing business" measured by gross receipts, is valid although the measure includes such royalties 47
(3) Therefore the decision of the Supreme Court of Georgia should be affirmed 48

TABLE OF CASES

Allen v. Riley, 203 U. S. 347, 51 L. ed. 216 19
Alward v. Johnson, 282 U. S. 509, 75 L. ed. 496 12
Attorney-General v. Western Union Tel. Co., 141 U. S. 40, 35 L. ed. 628 9
Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 83, 58 L. ed. 127, 133 44
Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U. S. 375, 49 L. ed. 242 9
Blodgett v. Silberman, 277 U. S. 1, 72 L. ed. 749 42
Bloomer v. McQuewan, 14 How. 539, 14 L. ed. 532 ..... 25, 18
California v. Pac. R. Co., 127 U. S. 1, 32 L. ed. 150 ..... 24, 23
Central Pac. R. Co. v. California, 162 U. S. 19, 40 L. ed. 903 25
Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234 14
Choctaw, Okla. & G. R. Co. v. Mackey, 256 U. S. 531, 65 L. ed. 1076 15
Collector v. Day, 11 Wall. 113, 20 L. ed. 122 3
Commonwealth v. Central Dist. etc. Co., 145 Pa. State 121, 27 Am. St. Rep. 677 21
Commonwealth v. Edison Electric Light Co., 145 Pa. State 131, 27 Am. St. Rep. 683 21
Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 422, 424, 52 L. ed. 1122 26
Cudahy Pkg. Co. v. Minnesota, 246 U. S. 450, 62 L. ed. 827 40
Des Moines Natl. Bank v. Fairweather, 263 U. S. 103, 68 L. ed. 191 34
East Ohio Gas Co. v. Tax Commission of Ohio, 283 U. S. 465, 75 L. ed. 1171 39
Eaton, etc. Co. v. Commissioner, 237 Mass. 523, 130 N. E. 99 28
Educational Films Corp. v. Ward, 282 U. S. 379, 75 L. ed. 400 ..... 47, 46, 37, 35, 32, 29, 16
Excelsior Wooden Pipe Co. v. Pac. Bridge Co., 185 U. S. 282, 46 L. ed. 910 20
Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319, 60 L. ed. 664 8

Flint v. Stone Tracy Co., 220 U. S. 107, 55 L. ed. 389 ..... 38, 36, 32, 29, 24
Forbes v. Gracey, 94 U. S. 762, 24 L. ed. 313 19
Fox Film Corp. v. Norman, 172 Ga. 403, 157 S. E. 664 2
Gillespie v. Oklahoma, 257 U. S. 501, 66 L. ed. 338 14
Gromer v. Standard Dredging Co., 224 U. S. 362, 56 L. ed. 801 10
Group No. 1 Oil Corp. v. Bass, 283 U. S. 279, 75 L. ed. 1032 19
Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904 33
Hart v. Tax Commissioner, 240 Mass. 37, 132 N. E. 261 28
Hibernia Sav. & Loan Society v. San Francisco, 200 U. S. 310, 50 L. ed. 495 13
Home Ins. Co. v. New York, 134 U. S. 495, 33 L. ed. 1025 ..... 39, 33
Hump Hairpin Co. v. Emmerson, 258 U. S. 290, 66 L. ed. 622 41
Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522, 60 L. ed. 779 14
Irwin v. Wright, 258 U. S. 219, 66 L. ed. 573 19
Jaybird Min. Co. v. Weir, 271 U. S. 609, 70 L. ed. 1112 ..... 24, 14
Kansas City etc. Co. v. Kansas, 240 U. S. 227, 60 L. ed. 617 45
Long v. Rockwood, 277 U. S. 142, 72 L. ed. 824 ..... 36, 29, 27, 26, 25, 23, 22, 16
Luckett v. Delpark, 270 U. S. 496, 70 L. ed. 703 20
Macallen v. United States, 279 U. S. 620, 73 L. ed. 874 ..... 46, 36, 35
Manhattan Co. v. Blake, 148 U. S. 412, 37 L. ed. 504 34
M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579 ..... 44, 23, 6, 4, 3
Metcalf v. Mitchell, 269 U. S. 514, 70 L. ed. 384 11
Miller v. Milwaukee, 272 U. S. 713, 71 L. ed. 487 47
New Brunswick v. United States, 276 U. S. 547, 72 L. ed. 693 19
New Jersey Bell Tel. Co. v. State Board of Taxes, 280 U. S. 338, 74 L. ed. 463 40

Norman v. Southwestern R. Co., 42 Ga. App. 812, 157 S. E. 531 32
Northwestern Mut. Life Ins. Co. v. Wisconsin, 275 U. S. 136, 72 L. ed. 202 ..... 40, 37, 35
Ohio Oil Co. v. Conway, 281 U. S. 146, 74 L. ed. 775 38
Opinion of the Justices, 165 N. E. 900 28
Orr v. Gilman, 183 U. S. 278, 46 L. ed. 196 42
Osborne v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204 24
Ozan Lumber Co. v. Union etc. Bank., 207 U. S. 251, 52 L. ed. 195 19
Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115 18
Pennock v. Dialogue, 2 Pet. 1, 19, 7 L. ed. 327 26
People ex rel. Lehigh & N. Y. R. Co. v. Sohmer, 217 N. Y. 443 32
People ex rel. U. S. Aluminum Printing Plate Co. v. Knight, 174 N. Y. 475, 63 L. R. A. 87 34
People's Natl. Bank v. Board of Equalizers, 260 U. S. 702, 67 L. ed. 471 33
Phila. & Reading R. Co. v. Pennsylvania, 15 Wall. 284, 21 L. ed. 164 41
Plumber v. Coler, 178 U. S. 115, 44 L. ed. 998 42
Pollock v. Farmers' Loan Co., 157 U. S. 429, 39 L. ed. 759 28
Provident Inst. v. Massachusetts, 6 Wall. 611, 18 L. ed. 907 33
Richmond Screw Anchor Co. v. United States, 275 U. S. 331, 72 L. ed. 303 26
Rockwood v. Commissioner, 257 Mass. 572, 154 N. E. 182 28
Shaffer v. Carter, 252 U. S. 37, 64 L. ed. 445 43
Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575, 72 L. ed. 709 ..... 26, 15, 14
Snyder v. Bettman, 190 U. S. 249, 47 L. ed. 1035 42
Society for Sav. v. Coite, 6 Wall. 594, 18 L. ed. 897 ..... 45, 33
South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261 13
Susquehanna Power Co. v. Tax Commission of Maryland, 283 U. S. 291, 75 L. ed. 1042 ..... 22, 10

Thompson v. Union Pac. R. Co., 9 Wall. 579, 19 L. ed. 792 7
Trimble v. Seattle, 231 U. S. 683, 58 L. ed. 435 19
Tucker v. Ferguson, 22 Wall. 527, 22 L. ed. 805 19
Tyler v. United States, 281 U. S. 497, 74 L. ed. 991 38
Union Pac. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787 7
United States v. Perkins, 163 U. S. 625, 41 L. ed. 287 42
United States Exp. Co. v. Minnesota, 223 U. S. 335, 56 L. ed. 459 40
Van Allen v. Assessors, 3 Wall. 573, 18 L. ed. 229 33
Von Baumbach v. Sargent Land Co., 242 U. S. 503, 61 L. ed. 460 32
Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565 ..... 22, 20, 18
Western Union Tel. Co. v. Attorney-General, 125 U. S. 530, 31 L. ed. 790 9
Willcuts v. Bunn, 282 U. S. 216, 75 L. ed. 304 ..... 20, 15, 13
Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275 9
Wilson v. Sandford, 10 How. 99, 13 L. ed. 344 20
Woods v. Carl, 203 U. S. 358, 51 L. ed. 219 19

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BRIEF FOR APPELLEE

STATEMENT OF THE CASE

No question of procedure is raised in this case. It is conceded that if royalties on copyrighted motion picture films cannot lawfully be included in gross receipts by which the occupation tax is measured under the Georgia statute, appellant is entitled to an injunction to prevent the State Tax Commissioner from collecting or attempting to collect the tax. On the other hand, if such royalties may lawfully be included, there was no error in refusing the injunction and dismissing the petition.

The principal business of appellant is the furnishing of motion picture films to exhibitors in Georgia and other states for the purpose of exhibition in motion picture houses controlled by them. Most of these are copyrighted and exhibitors pay a royalty to

appellant for the privilege of exhibiting them. (R. p. 3). Appellant contends that these royalties should be excluded from its gross receipts in estimating the tax imposed upon it under the Georgia excise tax act approved August 29, 1929, (Georgia Laws 1929, p. 103), the material portions of which are printed in the margin.* It was held by the trial court, in effect, that these royalties should be included in the plaintiff's gross receipts by which the tax is measured under the act. (R. p. 117). The Supreme Court of Georgia affirmed the decision by a divided court in a per curiam opinion. (R. p. 11). *Fox Film Corporation v. Norman,* 172 Ga. 403. From this judgment the appeal is entered. This is the sole question for decision.

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*Title: "An Act to provide for the raising of public revenue by a tax upon the privilege of engaging in certain occupations and by a tax upon certain business and commercial transactions and enterprises; to provide for the ascertainment and assessment and collection of such tax; *****" etc.

"Sec. 1. *****The term 'gross receipts' means the value proceeding or accruing from the sale of tangible property, (real or personal), or service, or both, and all receipts, actual or accrued, by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees, or other emoluments, however designated, and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid, or any other expense whatsoever, and without any deductions on account of losses. The term 'business' as used in this Act shall include all activities engaged in or caused to be engaged in with the object of gain, benefit, or advantage, either direct or indirect, and not excepting sub-activities, producing

BRIEF OF THE ARGUMENT

I

THE IMMUNITY OF FEDERAL INSTRUMENTALITIES FROM STATE TAXATION MUST BE GIVEN SUCH A PRACTICAL CONSTRUCTION AS WILL NOT UNDULY RESTRICT THE POWER OF THE STATE GOVERNMENT IMPOSING THE TAX.

Since *McCulloch v. Maryland,* (1819) 4 *Wheat.* 316, 4 *L. ed.* 579 and *Collector v. Day,* (1871) 11 *Wall.* 113, 20 *L. ed.* 122 there can be no question that the "instrumentalities" of the United States may not be taxed by the states and, conversely, that those of the states are not subject to tax by the federal government. The obvious reason is that to tax such "instrumentalities" interferes with government, national or state, in the exercise of those functions which devolve upon it. "The power to tax is the power to destroy," and under our dual system of government neither nation nor state can destroy the instrumentalities of the other or interfere with the other in the carrying out of its governmental functions.

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marketable commodities used or consumed in the main business activities, each of which sub-activities shall be considered business engaged in, taxable in the class in which it falls.*****"

"Sec. 2. ******from and after the first day of October, one thousand nine hundred twenty-nine, there is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values and/or gross receipts, as the case may be, as follows:

"Sec. 3. ********upon every person engaging or continuing within this state in the business of man-

While this is true, and we have no disposition to question the long established rule, but, on the contrary, recognize its propriety, indeed its necessity, we beg to suggest that there should be no extension of the meaning of the term "instrumentalities". At this time, when the government, through bond issues and treasury certificates, is borrowing money in amounts undreamed of when *McCulloch v. Maryland*, was decided; when the states and their subdivisions, to meet the demands upon them, are issuing vast quantities of tax exempt secureties; when officeholders, state and federal, have multiplied until one person in every ten is a government employee and supported by money contributed by the people in the form of taxes; when the functions of government, national, state, and local, have been broadened and multiplied and are constantly being extended; when a considerable part of the business of the country consists in the manufacture, sale, and utilization in one form or another of patented and copyrighted articles and formulae, the exemption of governmental instrumentalities, unless

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ufacturing, compounding or preparing for sale, profit or use any article, substance or substances, commodity or commodities, the amount of such tax to be equal to the value of the articles manufactured, compounded or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same (except as hereinafter provided), a tax of one-half of one mill on the dollar thereof. The measure of this tax is the value of the entire product manufactured, compounded, or prepared for sale, profit or use in this state, regardless of the place of sale or the fact that deliveries may be made to points outside the state." (With certain provisions and exceptions not material.) "In de-

restricted, will seriously embarrass the respective governments in the collection of their revenues. Indeed this exemption has already become so serious that it has been urged in some quarters that the Constitution should be so amended as to permit the taxation of these instrumentalities.

There is another important reason why the exemption from taxation accorded to instrumentalities of the government should not be extended. With the increasing demands upon the state governments it has been found necessary to adopt different methods of taxation from those which obtained a half century ago, not only for the purpose of raising additional revenue required, but also more equitably to distribute the tax burden and to conform the methods of taxation to changed conditions. An extension of the principle of exemption of federal instrumentalities will greatly hamper the states in the employment of those just and equitable means of taxation, will compel them to adopt other methods or retain those formerly employed but which are no longer consonant with

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termining value, however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between buyer and seller is such that the gross receipts from the sale are not indicative of the true value of the subject matter of the sale, the tax commissioner shall prescribe uniform and equitable rules for determining the value upon which such privilege tax shall be levied, corresponding as near as possible to the gross proceeds from the sale of similar products of like quality or character by the other taxpayers where no common interest exists between the buyer and the seller, but otherwise under similar circumstances and conditions.

"Sec. 4. ***upon every person engaging or con-

present conditions, and thus will cause inequalities in the tax burden and will relieve individuals and corporations, who are in no real sense part of the governmental machinery and not entitled to protection as such, from the just burden of government.

The propriety of limiting the exemption of instrumentalities to those necessary to enable the government to carry on its essential governmental functions has long been recognized by this Court. Indeed, in *McCulloch v. Maryland*, it was held that the principle did not extend to the tax paid on the real property of the Bank of the United States in common with other real property, nor to a tax imposed on the proprietary interest which the citizens of the state held in the institution in common with other property of the same description.

More than fifty years ago, in the *Pacific Railroad* cases, it was established that, "No constitutional implication prohibited a state tax upon the property of an agent of the government merely because it is the property of such agent."

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tinuing within this state in the business of selling any tangible property whatsoever, real or personal, there is likewise hereby levied, and shall be collected, a tax equivalent to two mills on the dollar of the gross receipts of the business.******

"Sec. 5. ***upon every person engaging or continuing within this state in the following businesses there shall be levied and collected on account of each of the businesses engaged in, taxes at the rate of three mills on the dollar upon the gross receipts of said business, towit: Steam railroads****" and other enumerated public utilities.

"Sec. 6. **** upon every person engaging or continuing within this state in the business of operat-

Union Pac. R. Co. v. Peniston, (1873), 18 *Wall.* 5, 21 *L. ed.* 787.
Thompson v. Union Pac. R. Co., (1870), 9 *Wall.* 579, 19 *L. ed.* 792.

The Court, speaking through Mr. Justice Strong, in the *Peniston case*, said:

> "But it is often a difficult question whether a tax imposed by a State does in fact invade the domain of the General Government, or interfere with its operations to such an extent, or in such a manner, as to render it unwarranted. It cannot be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The States are, and they ever must be, co-existent with the National Government. Neither may destroy the other. Hence the Federal Constitu-

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ing a theater" and other places of amusement "the tax shall be three mills on the dollar upon the gross receipts of any such business.

"Sec. 7. **** upon every person engaged or continuing within this State in any and every business not included in the preceding sections there is levied and shall be collected a tax equal to two mills on the dollar of the gross receipts of any such business.

"There shall be excepted from the receipts of all persons and/or companies taxed under this Act any amount that may be derived from the business or income of any such person or companies as the State of Georgia is prohibited from taxing under the constitution of the United States of America.

tion must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise."

The limitation of the exemption is to be found in a large number of cases for it has been invoked times without number in an effort to evade the payment of taxes. Reference to a few of these cases may perhaps be of value.

A surety company does not by becoming surety on bonds required by the United States, act as a federal instrumentality so as to be exempt from a state tax on premiums received.

Fidelity & Deposit Co. v. Pennsylvania, (1916), 240 *U. S.* 319, 60 *L. ed.* 664.

Land conveyed by the United States to a corporation for dry dock purposes is not exempted from state taxation, as an agency of the United States, because of a reservation in the conveyance of the right to the free use of the dry dock, and a provision therein

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"Sec. 8. ******in computing the amount of tax levied under the provisions of this Act for any year there shall be deducted from the values or from the gross receipts of the business, as the case may be, an exemption of thirty thousand ($30,000.00) dollars of the amount of such values or gross receipts. Every person exercising any privilege taxable hereunder for any fractional part of a tax year shall be entitled to an exemption of that part of the sum of thirty thousand ($30,000.00) dollars which bears the same proportion of the total sum that the period of time during which such person is engaged in such business bears to a whole year.

for forfeiture in case of the continued unfitness of the dock for use, or the use of the land for other purposes.

Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, (1904), 195 *U. S.* 375, 49 *L. ed.* 342.

In the telegraph company cases it was held that permission granted by the United States to run lines over the public domain and over postroads, the lines being employed in the national service, did not make the telegraph companies such agencies of the federal government as would exempt their lines and other property from state taxation; the Court saying:

> "Agencies of the federal government are only exempt from state taxation so far as such taxation may interfere with or impair their efficiency in performing the functions by which they serve the government."

Western Union Tel. Co. v. Attorney-General, (1888), 125 *U. S.* 530, 31 *L. ed.* 790.
Attorney-General v. Western Union Tel. Co., (1891), 141 *U. S.* 40, 35 *L. ed.* 628.
Williams v. Talladega, (1912), 226 *U. S.* 404, 57 *L. ed.* 275.

"Sec. 9. ********If any person after the first day of October, one thousand nine hundred and twenty-nine, shall engage or continue in any business for which a privilege tax is imposed by this Act, he shall be deemed to have applied for and to have duly obtained from the State of Georgia a license to engage in and to conduct such business for the current tax year, upon the condition that he shall pay the tax accruing to the State of Georgia under the provisions of this Act; and he shall hereby be duly licensed to do such business."

Private property in which the federal government may have an interest or which is subject to its control in the exercise of its power over navigable waters and which is used as a part of a project operated under a federal license, is not exempt from state taxation as an instrumentality of the federal government.

"Property employed in the exercise of a privilege or franchise granted by the federal government, but for private business advantage, is not exempt as a federal instrumentality from state taxation."

Susquehanna Power Co. v. Tax Commission of Maryland, (1931), 283 U. S. 291, 75 L. ed. 1042.

"The use of machinery and boats in the harbor of San Juan, Porto Rico, in the performance of a dredging contract with the United States, does not exempt them from local taxation.

Gromer v. Standard Dredging Co., (1912), 224 U. S. 362, 56 L. ed. 801.

The exemption of salaries of government employees has been strictly limited to actual employees

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Section 10 exempts insurance companies, banks and trust companies, mutual savings banks, mutual fire-insurance companies, labor, agricultural and horticultural societies, farm products, cemetery companies, fraternal benefit societies, mutual building and loan associations, charitable, educational and religious societies, and civic organizations not operated for profit.

Section 11 excepts sales of gasoline.

"Sec. 12. *****the taxes hereby levied shall be payable in quarterly installments, that is to say, all taxes accruing in any quarter shall be payable within

appointed by a government with tenure, emolument, and duties fixed by law. It does not include persons who contract to render a specific service, such as a consulting engineer.

Metcalf v. Mitchell, (1926), 269 *U. S.* 514, 70 *L. ed.* 384.

This is, perhaps, the leading case. In the opinion the Court, speaking through Mr. Justice Stone, said:

> "Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers are immune from the taxing power of the other. ****** When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentali-

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thirty (30) days after the expiration of such quarters. The taxpayer shall, within said period of thirty (30) days, prepare and mail or otherwise deliver to the State Tax Commissioner a tax-return under oath, together with a remittance for the amount of the taxes due as shown by said return.********".

Sections 13 to 19 contain administrative provisions not pertinent to the present inquiry.

"Sec. 20. ******The tax imposed by this Act shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business taxable hereunder except as in this Act otherwise specifically provided.****"

Sections 21 to 28 are not material.

ty of government within the meaning of the rule. ********As cases arise lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. **********In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other.****** Taxation by either the state or the federal government affects in some measure the cost of operation of the other.*******Hence, the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax**** *****or the appropriate exercise of the functions of the government affected by it."

One having a contract to carry the mails is not immune as an agency of the federal government from state taxation of property used in the performance of such contract, even though the tax is based upon the gross receipts from his contract with the government.

Alward v. Johnson, (1931), 282 *U. S.* 509, 75 *L. ed.* 496.

United States treasury checks or orders issued for the payment of interest accrued on bonds of the United States are held to be taxable by the states.

Hibernia Sav. & Loan Society v. San Francisco, (1905), 200 *U. S.* 310, 50 *L. ed.* 495.

While a tax upon the obligations of a state or its political subdivisions falls within the implied exemption of instrumentalities of state government from federal taxation, the exemption does not extend to cases where no direct burden is laid upon the government instrumentality and there is only a remote influence upon the exercise of the functions of government; as where such securities are sold by the owner, realizing a profit taxable as income.

Willcuts v. Bunn, (1931), 282 *U. S.* 216, 75 *L. ed.* 304.

Recognizing that the full power of imposing excise taxes granted to the national government cannot be constitutionally exercised so as to impede or embarrass a state in the discharge of its functions, yet when a state engages in a business which is of a private nature that business is not withdrawn from the taxing power of the nation.

South Carolina v. United States (1905), 199 *U. S.* 437, 50 *L. ed.* 261.

In many other cases, particularly recent cases, the Court has limited the exemption of government instrumentalities, giving to the doctrine "a practical construction which permits both to function*****so as not to restrict unduly the government imposing the tax****or the functions of the government which may be affected by it."

The Court, for the protection of Indians, wards of the United States, has extended the concept of federal instrumentalities to its greatest length in

Indian Territory Illuminating Oil Co. v. Oklahoma, (1916), 240 U. S. 522, 60 L. ed. 779.

Choctaw, O. & G. R. Co. v. Harrison, (1914) 235 U. S. 292, 59 L. ed. 234.

Jaybird Min. Co. v. Weir, (1926), 271 U. S. 609, 70 L. ed. 1112.

Gillespie v. Oklahoma, (1922), 257 U. S. 501, 66 L. ed. 338.

Appellant strongly relies on the *Gillespie case*, which held that an Indian's income from the lease of his lands is exempt from state taxation.

These cases must be considered in the light of the purpose which Congress had in mind in its Indian legislation:

> "The end sought and the mode of attaining it adopted by Congress in the legislation providing for the welfare of the Indians by setting apart, by allotment or otherwise, tribal lands or the public domain, restricted for their benefit, led to the conclusion that those lands and the uses of them were so intimately connected with the performance of governmental functions as clearly to require independence of all state control so complete that nothing short of an express declaration by Congress would have subjected them to state taxation."
>
> *Shaw v. Gibson-Zahniser Oil Corp.*, (1928), 276 U. S. 575, 72 L. ed. 709.

It was held in this case that the interest of the lessee of land purchased by the government for a full blood Creek Indian out of royalties on allotted land, and restricted as to alienation, is not such an instrumentality of government as to be exempt from state taxation.

Admitting that "in a broad sense all lands which the Indians are permitted to purchase out of the taxable lands of the state in this process of their emancipation and assumption of the responsibility of citizenship, whether restricted or not, may be said to be instrumentalities in that process," it is said in the *Shaw case, supra,* Mr. Justice Stone speaking for the Court:

> "There are some instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks.******These lands we take to be of that character."

And in another case in which exemption was claimed, in which Mr. Justice Brandeis delivered the opinion of the Court, it was said:

> "The mere fact that property is used, among others, by the United States as an instrument for effecting its purpose does not relieve it from state taxation.********And even though it be granted that the federal government utilized the railroad as an instrument in working out its policy toward the Indians, the tax upon the railroad property would be none the less valid."

Choctaw, Okla. & G. R. Co. v. Mackey, (1921), 256 *U. S.* 531, 536, 65 *L. ed.* 1076, 1080.

These Indian land cases seem to be recognized as in a class by themselves.

Willcuts v. Bunn, supra.

It is hardly necessary to suggest, using the language of the Chief Justice in the last case cited:

> "The limitation of this principle (the exemption of government securities from taxation) to

its appropriate applications is also important to the successful working of our governmental system. The power to tax is no less essential than the power to borrow money, and, in preserving the latter, it is not necessary to cripple the former by extending the constitutional exemption from taxation to those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only a remote, if any, influence upon the exercise of the functions of government." (p. 225).

II

ROYALTIES FROM COPYRIGHTS, IF INSTRUMENTALITIES OF THE UNITED STATES AT ALL, ARE SUCH ONLY IN A QUALIFIED SENSE, DIFFERING FUNDAMENTALLY FROM SUCH INSTRUMENTALITIES AS GOVERNMENT BONDS OR THE SALARIES OF GOVERNMENT OFFICIALS.

"Obviously it is not true that patents are instrumentalities of the government."

This is the statement of Mr. Justice Holmes in his dissenting opinion in *Long v. Rockwood,* (1928), *277 U. S.* 142, *72 L. ed.* 824.

While not going quite so far, Mr. Justice Sutherland said:

> "It may be conceded that a tax measured by income derived from copyrights does not impose a burden on the exercise of a vital power of the federal government as it would in the case of Federal bonds."

This occurs in the dissent in *Educational Films Corporation v. Ward,* (1931), 282 *U. S.* 379, 75 *L. ed.* 400.

As Justices Brandeis, Sutherland, and Stone joined Mr. Justice Holmes in his dissent in the first case, and Justices Van Devanter and Butler agreed with Mr. Justice Sutherland in the second, it would seem that, though the statements were made in the course of dissenting opinions, they express the view of a majority of the members of the Court.

The *Rockwood* and *Ward* cases are discussed in subsequent divisions of this brief.

It would seem there could be no question that royalties from a patent or copyright are not such instrumentalities or agencies of the United States as are federal securities. The interest of the government in a copyright is incidental; not direct or immediate as in the case of a bond. The purpose of a copyright is to encourage and protect authors and secure to them the benefits of their productions The public derives indirect benefit from the encouragement to authors and inventors extended by copyrights and patents, but the government as such has no interest and derives no direct benefit from a copyright or patent, and certainly not from the royalty paid for its use. The government would function in precisely the same way and without the slightest interference though taxes imposed by the states might be so burdensome as to deprive the author or inventor of the fruits of his production.

A copyright is a franchise granted by the United States.

> "The franchise which the patent grants consists altogether in the right to exclude everyone from making, using, or vending the thing patented without the permission of the patentee. This is all he obtains by the patent."

Bloomer v. McQuewan, (1852), 14 *How.* 539, 549, 14 *L. ed.* 532, 537.

All that the government is interested in is the protection of this franchise which it has granted. A tax on royalties paid under a license from the owner of a copyright, it is submitted, interferes only indirectly and remotely with the copyright, the franchise granted by the government. It lessens to some extent the amount of income which the owner of the copyright would otherwise receive from it, but it does not diminish the right given by the United States to exclude others from "making, using, or vending the thing" copyrighted. That right is just as full and complete with the tax as without it. The tax does not make the privilege less exclusive. This seems to be recognized by the decisions of this Court which permit the states to tax patented articles.

> "Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the state over all property within its limits.
>
> "There is no objection to the law of Virginia requiring a license for the sale of sewing machines, by reason of the grant of letters patent for the invention."

Webber v. Virginia, (1881), 103 *U. S.* 344, 26 *L. ed.* 565.

The power of the states to exercise control over articles manufactured by patentees, to regulate the assignment of patent rights, and to prevent fraud in connection therewith has been sustained by many decisions of this court.

Patterson v. Kentucky, (1879), 97 *U. S.* 501, 24 *L. Ed.* 1115.

Allen v. Riley, (1906), 203 *U. S.* 347, 51 *L. ed.* 216.

Woods v. Carl, (1906), 203 *U. S.* 358, 51 *L. ed.* 219.

Ozan Lumber Co. v. Union etc. Bank, (1907), 207 *U. S.* 251, 52 *L. ed.* 195.

"The fact that the franchise came from a grant by the United States is no more reason for exemption, standing by itself than is the derivation of the title to a lot of land from the same source", as was observed by Mr. Justice Holmes in the dissenting opinion in *Long v. Rockwood, supra,*

While lands owned by the United States are, of course, free from taxation by the state in which they are located, where the lands, or any interest therein, whether freehold or for years, are sold, such interest is subject to state taxation.

Group No. 1 Oil Co. v. Bass, (1931), 283 *U. S.* 279, 75 *L. ed.* 1032.

Trimble v. Seattle, (1914), 231 *U. S.* 683, 58 *L. ed.* 435.

Irwin v. Wright, (1922), 258 *U. S.* 219, 66 *L. ed.* 573.

Tucker v. Ferguson, (1875), 22 *Wall.* 527, 22 *L. ed.* 805.

Forbes v. Gracey, (1877), 94 *U. S.* 762, 24 *L. ed.* 313.

New Brunswick v. United States, (1928), 276 *U. S.* 547, 72 *L. ed.* 693.

Income from royalties paid for the use of a copyright is derived directly from the contract between the licensee and the owner of the copyright, and not from the copyright itself. A suit to recover such royalties is not a suit arising under the copyright laws and may not be brought in a federal court on that ground.

Wilson v. Sandford, (1850), 10 *How.* 99, 13 *L. ed.* 344.
Excelsior Wooden Pipe Co. v. Pac. Bridge Co., (1902), 185 *U. S.* 282, 46 *L. ed.* 910.
Luckett v. Delpark, (1926), 270 *U. S.* 496, 70 *L. ed.* 703.

In dealing with a situation somewhat similar, the Chief Justice, in a recent case already referred to, said:

> "But it does not follow, because a tax on the interest payable on state and municipal bonds is a tax on the bonds and therefore forbidden, that the Congress cannot impose a nondiscriminatory excise tax upon the profits derived from the sale of such bonds. The sale of the bonds by their owners, after they have been issued by the state or municipality, is a transaction distinct from the contracts made by the government in the bonds themselves, and the profits on such sales are in a different category of income from that of the interest payable on the bonds."

Willcuts v. Bunn, supra. (p. 227).

The appellant owns the copyright on certain motion pictures. Under the exclusive franchise granted by the copyright it has reproduced these pictures and owns them in the form of films. It has granted to exhibitors the right to exhibit these pictures, using the films for the purpose.

The Supreme Court of Pennsylvania quotes from the opinion by Mr. Justice Field in *Webber v. Virginia, supra*:

> "The right conferred by the patent laws of the United States on inventors, to sell their inventions and discoveries, does not take the tangible property in which the invention or discovery

may be exhibited or carried into effect from the operation of the tax and license laws of the state.'

This Court then draws the clear distinction between the patent right and the interest of a lessee or licensee of the patented article, saying:

> "Whether the 'tangible property'—that is, the machines or appliances made and ready for use—is in the hands of the makers, of venders, lessees, or licensees, can make no difference. Such property is not a patent right, but the visible, tangible, fruit of the right secured by the patent, which passes to a purchaser or lessee in precisely the same way that any other manufactured articles pass from the maker to the buyer or lessee."

Commonwealth v. Edison Electric Light Co., 145 *Pa. State* 131, 27 *Am. St. Rep.* 683.
Commonwealth v. Central Dist. etc. Co., 145 *Pa. State* 121, 27 *Am. St. Rep.* 677.

In the instant case the owner of the copyright licenses films produced under the copyright for exhibition. In the Pennsylvania cases the owner of the patent on certain telephone apparatus leased the patented appliances for use in a telephone system. Are not the two cases precisely analagous?

The owner of a copyright on a book grants to a publisher the right to print 100,000 copies. These books, when printed, are tangible property owned by the purchaser and are subject to tax like any other property in the state in which they are found. Is there any essential difference between books printed and on which the publisher pays to the owner of the copyright a royalty and a motion picture exhibited under a license from the owner of the copyright on that picture for which a royalty is paid?

If patented articles were not subject to taxation by the states the patent would be more valuable, but since *Webber v. Virginia* it seems to be the settled law that they are subject, and that the patent is not interfered with or the franchise granted by Congress limited or impaired by such taxation. We are unable to see any substantial difference between taxing a patented article and taxing the exhibition of a copyrighted film. Neither, it seems to us, is an instrumentality of the United States in the sense in which that term is used in the decisions to which reference has been made. The taxation of neither interferes with the federal government in the discharge of any of its functions. Neither limits the franchise granted by Congress. In both the effect on the value of the franchise is small, incidental, and casual.

We adopt the language of Mr. Justice Stone in *Susquehanna Power Co. v. State Tax Commission, supra*:

> "It would be difficult to suppose any case in which the adverse effect of a tax upon a governmental purpose would be more remote or attenuated, or in which the asserted immunity would more seriously impair the sovereign power of the state to tax, than in this one."

III

LONG v. ROCKWOOD, (1928), 277 U. S. 142, 72 L. ed. 824.

This seems to be the only case in which it has been held that royalties from a patent or copyright are instrumentalities of the United States and are not subject to taxation by the states. There is a casual

intimation by Chief Justice Marshall in *McCulloch v. Maryland*, 4 *Wheat.* 316, 432, that patent rights are instrumentalities of the government, but the court was not called on to decide the question until it was presented in *Long v. Rockwood.*

The majority of the court, speaking through Mr. Justice McReynolds, said:

> "The power to exclude others granted by the United States to the patentee subserves a definite public purpose—to promote the progress of science and useful arts. The patent is the instrument by which that end is to be accomplished. It affords protection during the specified period in consideration of benefits conferred by the inventor. And the settled doctrine is that such instrumentalities may not be taxed by the states."

The patent right is compared to a corporate franchise granted by the United States, and the opinion of Mr. Justice Bradley in *California v. Pac. R. Co.*, (1888), 127 *U. S.* 1, 32 *L. ed.* 150 that "**** it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a state", is quoted to sustain the Court's position.

It may be remarked, parenthetically, that if the state cannot legally tax a franchise granted by the United States, neither can Congress tax a franchise granted by the state, but the Corporation Tax Act of 1909 did just that, and measured the amount of the tax by income. It was upheld by this Court.

> "The excise imposed by the act of August 5, 1909, §38, upon the carrying on or the doing of business, in a corporate or quasi corporate capacity, is not invalid because the business taxed

is done in pursuance of the authority granted by a state, in the creation of private corporations."

Flint v. Stone Tracy Co., (1911), 220 *U. S.* 107, 55 *L. ed.* 389.

The court distinguishes the *Pacific Railroad case*, from which Mr. Justice McReynolds quoted, along with a number of others, some of which are cited by him, saying:

> "An examination of these cases will show that in each case where the tax was held invalid, the decision rested upon the proposition that the corporation was created to carry into effect powers conferred upon the federal government in its sovereign capacity, and the attempted taxation was an interference with the effectual exercise of such powers." (p. 152).

The Court also quotes from the great opinion of Chief Justice Marshall in *Osborne v. Bank of United States*, 9 *Wheat.* 738, 6 *L. ed.* 204, in which he concedes that if the bank were a mere private corporation engaged in its own business it "would certainly be subject to the taxing power of the state as any individual would be."

In these cases, familiarly known as the Corporation Tax cases, the whole subject of exemption of instrumentalities of government is discussed, the conclusion being that only those instrumentalities which are created to carry into effect powers appertaining to the government as a sovereign and which are necessary for the proper exercise of those powers, are exempt.

Is not the opinion of the majority, speaking through Mr. Justice McReynolds, at variance with his dissent in *Jaybird Min. Co. v. Weir, supra*, in which

he expressed the "opinion that the effect of the assailed tax upon the instrumentality of the United States is remote and tax is valid under the doctrine approved in Central P. R. Co. v. California, 160 U. S. 91, 119", the very case, by the way, from which he quotes and on which he principally relies in holding the tax challenged in the *Rockwood* case invalid?

With great deference, it may be suggested that the tax considered in the *Rockwood* case was not on the patent or on a "franchise granted by the United States." The franchise granted is "the right to exclude everyone from making, using or vending the thing patented (or copyrighted) without the permission of the patentee." *Bloomer v. McQuewan, supra.* The tax was upon the income growing out of a private contract between the patentee and one to whom he had granted permission to use an article produced under the patent.

It would seem that the principle of exemption of governmental instrumentalities is extended further in this case than it has been in any previous decision. Indeed, the decisions of this Court have indicated a purpose to restrict the doctrine within narrow limits so as not to hamper either the state or the federal government, as the case may be, in the exercise of the essential power of taxation. The doctrine grows out of the necessity, under our dual system, of preserving the national and the state governments in the exercise of their governmental functions. It is difficult to see how a non-discriminatory tax imposed by a state can be said to impede or hamper the federal government in the discharge of a governmental function because profits arising out of a private contract for the use

of an article produced under a copyright are included in the gross receipts by which the tax is measured.

In the dissenting opinion of Mr. Justice Holmes, in which Justices Brandeis, Sutherland, and Stone concurred, it was asserted, not that the states might tax the royalties, but the patent or copyright itself.

> "Why then cannot a state tax a patent by a tax that in no way discriminates against it? *Obviously it is not true that patents are instrumentalities of the government.* They are used by the patentees for their private advantage alone. If the government uses them it must pay like other people. Richmond Screw Anchor Co. v. United States, (1928), 275 U. S. 331. The use made by the patentee may be not to make and sell the patented article but simply to keep other people from doing so in aid of some collateral interest of his own. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 422, 424. In this case the advantages expected by the government are mainly the benefits to the public when the patent has expired and secondarily the encouragement of invention. Pennock v. Dialogue, 2 Pet. 1, 19. The most that can be said is that a tax is a discouragement so far as it goes and to that extent in its immediate operation runs counter to the government intent. But patents would be valueless to their owner without the organized societies constituted by the states, and the question is why patents should not contribute as other property does to maintaining that without which they would be of little use." (Italics ours.)

Again we call attention to the unanimous decision of the Court in *Shaw v. Gibson-Zahniser Oil Corp., supra,* where it was held that there are some instrumentalities of government which will be sub-

ject to state taxation unless Congress expressly prohibits it, and that whether in the absence of an express declaration by Congress governmental instrumentalities are exempt must be determined from the purpose and the character of the legislation creating them. Patents and copyrights and royalties therefrom are not exempted from state taxation by express congressional declaration and, we respectfully submit, there is nothing in the Constitution or the laws under which patents and copyrights are granted which makes necessary such exemption in order to carry out fully the purpose designed to be accomplished by the grant of the patent or copyright. A copyright is property owned by a private individual and used by him for private purposes and for the enhancement of his private fortune. It is protected by the state and would be of little value were it not so protected. What reason is there to exempt its owner from taxation of this property to the same extent and by the same methods adopted for other property which receives no greater benefit and no higher protection from the state?

If the *Rockwood* decision is carried to its logical conclusion, the states will be crippled in the raising of their revenue, and manifest inequalities and discriminations must be made in the levy and collection of taxes. Under present conditions a large part of the business of the country is based on patents and copyrights. If these, and revenues derived from them, cannot be taxed as other property, income, and business in the states are taxed, monopolies will be created and injustice done to the states and their citizens. The states themselves will lose very considerable revenue, though the federal government will not be benefitted in the remotest degree.

If this decision is allowed to stand, we respectfully submit that it should not be extended but should be confined to the exact question decided by the Court. This decision is that "a state cannot, under the provisions of the Federal Constitution, tax royalties for the use of patents issued by the United States."

The Massachusetts tax which was challenged was an income tax. An income tax, under the decisions of this Court, and certainly under the decisions of the Supreme Judicial Court of Massachusetts, is a direct tax.

Pollock v. Farmers' Loan Co., (1895), 157 *U. S.* 429, 39 *L. ed.* 759.
Hart v. Tax Commissioner, 240 *Mass.* 37, 132 *N. E.* 621.
Eaton, etc. Co. v. Commissioner, 237 *Mass.* 523, 130 *N. E.* 99.
Re Opinion of the Justices, 165 *N. E.* 900.

The Massachusetts Court in this very case held in terms that "It was a property tax."

Rockwood v. Commissioner, 257 *Mass.* 572, 154 *N. E.* 182.

The effect of the *Rockwood* decision is, then, that a direct tax on royalties received from a patented article cannot be imposed by the states. The court does not hold that these royalties are instrumentalities of the United States in the sense that government bonds are, and as Mr. Justice Holmes said, "obviously they are not." It is not held that these royalties may not be taxed indirectly or be included in the measure of a tax imposed on a legitimate subject of state taxation or that they stand on a different footing from interstate commerce, where the rule, established by the

decisions of this Court, is that a state tax affecting such commerce is valid if it affects such commerce not directly but only incidentally and remotely.

IV.

EDUCATIONAL FILMS CORPORATION V. WARD, (1931), 282 U. S. 379, 75 L. ed. 400.

In this case the question was again raised as to the immunity of copyrights and income derived from them from state taxation. The case also presented the question as to whether a tax measured by net income is void so far as the measure includes royalties from copyrights. The court directed its attention to the second proposition, leaving the first undecided except so far as it had been settled in *Long v. Rockwood, supra.*

We trust that the failure of the Court to reaffirm the *Rockwood* case is an intimation that the decision was not satisfactory to a majority of the Court, and that it was allowed to stand only because it was not necessary for the decision of the case *sub judice* to overrule it. Be that as it may, the *Educational Films* case, not in terms but in practical effect, limits the *Rockwood* decision to the question actually decided, which was that a state may not impose a *direct tax* on a patent or income derived therefrom. Expressly approving *Flint v. Stone Tracy Co.*, (1911), 220 *U. S.* 107, 162; 55 *L. ed.* 389, 417, and the long line of cases which have followed it, the Court held that the tax in question was a tax on the franchise of the corporation, the right to do business in a corporate capacity, measured by net income and was valid, although royalties from copyrights were included in the income. This decision reaffirms the statement that:

"The immunity of federal instrumentalities from state taxation must be given such a practical construction as will not, on the one hand, unduly restrict the power of the government imposing the tax, or, on the other hand, the exercise of the functions of the government which may be affected by it."

And in it the Court went further and said:

"The rule that government instrumentalities are immune from taxation will not be mechanically applied, regardless of the consequences to the operations of government.

"The boundaries between the respective powers and immunities of state and national governments should be so drawn as to preserve to each government, within its own sphere, the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other." (Sylabus Lawyer's Edition, 75 L. ed. 400.)

V

THE TAX IMPOSED BY THE GEORGIA ACT OF 1929 IS AN EXCISE TAX UPON THE PRIVILEGE OF ENGAGING IN CERTAIN OCCUPATIONS AND UPON CERTAIN BUSINESS AND COMMERCIAL TRANSACTIONS. IT IS A PRIVILEGE OR OCCUPATION TAX MEASURED BY GROSS RECEIPTS.

The purpose of the act, the pertinent provisions of which are set out in the margin, (pp. 2 et seq.), as declared in its title is:

"To provide for the raising of public revenue by a tax upon the privilege of engaging in certain occupations and by a tax upon certain business and commercial transactions and enterprises ****".

This legislative intent is unmistakable, running through the entire act. There is not the slightest suggestion of any other purpose, and no clause is inconsistent with the purpose declared. It is evident that the General Assembly of Georgia intended to impose a license or excise tax on the privilege of "doing business" in the state. On merchants and manufacturers, it is, in effect, a sales tax, and it is popularly so called. Other lines of business besides merchandising are taxed on their gross receipts in excess of an exemption of $30,000, different rates being made applicable to different businesses. Certain other businesses, which it was believed were already bearing their proper proportion of the tax burden or which public policy suggested should be exempted, were excluded from the operation of the act.

The tax is payable quarterly, and it was provided that

> "If any person****shall engage or continue in any business for which a privilege tax is imposed by this act he shall be deemed to have applied for and to have duly obtained from the State of Georgia a license to engage in and conduct such business for the current tax year upon the condition that he shall pay the tax accruing under the provisions of this act, and he shall thereby be duly licensed to do such business." (Sec. 9).

In the only decision by the Georgia courts in which the act has been construed, it is held to be, not a tax on income, but on the privilege of doing business.

> "It is clear that the act was not intended to lay a tax upon the plaintiff's primary franchise, that is, its right to live and have its being as a corporation, but that the imposition is an excise

tax upon the secondary franchise, or the privilege of doing business in its corporate capacity. Von Baumbach v. Sargent Land Co., 242 U. S. 503; Flint v. Stone Tracy Co., 220 U. S. 107; People ex rel. Lehigh & New York R. Co. v. Sohmer, 217 N. Y. 443; 14A C. J. 544 et seq. *The assessment is not a tax on income.********The plaintiff is not liable unless it was engaged in doing business within contemplation of the statute. If it was not so engaged, the magnitude of its business or receipts is immaterial. On the other hand, it makes no difference how small a business it may have carried on, provided its gross receipts exceeded the exemption (see section 8) if it in fact did engage in business. In the former case it would be nontaxable; in the latter taxable."

Norman v. Southwestern R. Co., 42 Ga. App. 812, 815, 157 S. E. 531.

VI

THE STATES MAY LAWFULLY IMPOSE AN EXCISE TAX UPON THE PRIVILEGE OF DOING BUSINESS WITHIN THE STATE EVEN THOUGH THERE BE INCLUDED IN THE MEASURE OF THE VALUE OF SUCH PRIVILEGE INSTRUMENTALITIES OR INCOME WHICH ARE EXEMPT FROM DIRECT TAXATION.

This was distinctly reaffirmed in *Educational Films Corporation v. Ward, supra.* The Court reviewed a large number of cases in which the principle had been established and uniformly adherred to for more than seventy years. As the Court has so recently thoroughly considered the question, only a brief reference will be made to a few of the many cases.

The typical case, of course, is *Flint v. Stone Tra-*

cy Co., supra, which upheld a federal tax levied upon a corporate franchise granted by a state but measured by the entire corporate income, including, in that case, income from tax exempt municipal bonds.

The state has power to levy a franchise tax on a state bank without deducting an amount invested in United States securities, although the amount of the tax is measured by the deposits.

Society for Sav. v. Coite, (1868), 6 *Wall.* 594, 18 *L. ed.* 897.

Provident Inst. v. Massachusetts, (1868), 6 *Wall.* 611, 18 *L. ed.* 907.

Likewise a manufacturing corporation may be taxed on its franchise measured by the excess of the market value of its capital stock over the value of its real estate and machinery, though a large part of its capital is invested in nontaxable securities.

Hamilton Mfg. Co. v. Massachusetts, (1868), 6 *Wall.* 632, 18 *L. ed.* 904.

And a corporation may be taxed by a tax levied upon its corporate franchise and measured by the percentage of dividends based upon the capital stock without deducting the amount of capital stock invested in United States bonds.

Home Ins. Co. v. New York, (1890), 134 *U. S.* 594, 33 *L. ed.* 1025.

State laws taxing shareholders on the full value of their shares in national banks, although the banks own tax exempt federal securities, are also upheld.

Van Allen v. Assessors, (1866), 3 *Wall,* 573, 18 *L. ed.* 229:

Peoples Natl. Bank v. Board of Equalizers, (1922), 260 *U. S.* 702, 67 *L. ed.* 471.

Des Moines Natl. Bank v. Fairweather, (1923), 263 *U. S.* 103, 68 *L. ed.* 191.

Congress may tax state banks upon the average amount of their deposits although deposits of state funds by state officers are included.

Manhattan Co. v. Blake, 148 *U. S.* 412, 37 *L. ed.* 504.

The Court of Appeals of New York has applied the principle to capital invested in patents, holding that a corporation may be taxed upon its francise computed upon the basis of the amount of its capital stock employed within the state, although such capital stock is substantially all invested in United States patents.

People Ex. Rel. U. S. Aluminum Printing Plate Co. v. Knight, (1903), 174 *N. Y.* 475, 63 *L. R. A.* 87.

There are a few cases which seem to be out of harmony with the long line of which those cited are only a small part. This apparent conflict in the cases arises from the construction placed upon the taxing statute; if construed as a tax on property, or a direct tax on the income of property which is the same, government securities or other instrumentalities are held to be exempt, but if construed as an excise or franchise tax they are not. Whether the tax is one or the other is often a difficult question. Under the more recent cases the purpose of the legislature in enacting the taxing statute seems fundamental in determining whether the statute is valid as imposing a franchise tax or invalid as imposing a property or income tax, and this purpose is not to be determined merely by the desig-

nating terms or form of the statute or the construction placed upon it by the state court.

Educational Films Corp. v. Ward, supra.

Keeping in mind the distinction between a tax on property and a franchise or other form of excise tax, the decisions may be easily reconciled, the conflict being apparent rather than real. The two cases which at first blush seem to depart from the rule as established by previous decisions are *Northwestern Mutual Life Insurance Co. v. Wisconsin*, 275 *U. S.* 136, 72 *L. ed.* 202 and *Macallen v. United States*, 279 *U. S.* 620, 73 *L. ed.* 874.

In both the state statute in question imposed a tax which in form was an excise, and both were so construed by the state courts. In the first case it was said by this Court:

> "If the challenged act, *whatever called*, really *imposes a direct charge upon interest* derived from United States bonds it is *pro tanto* void. The fundamental question often presented in cases similar to these is whether by true construction of the statute the assessment must be regarded as an assessment upon property or one upon privileges or franchise of the corporation." (p. 140 Italics ours).

The Court construed the Wisconsin statute as imposing a tax upon property and not on privileges or franchise. So construed the tax was on the income from bonds of the United States and, of course, violated the constitutional inhibition. The tax in that case purported to be measured by gross income.

In the *Macallen case*, the state court held the tax to be an excise on the privilege of doing business measured by net income. This Court said:

"The distinction pointed out in these cases (*Flint v. Stone Tracy Co., supra,* and others of similar import) is between an *attempt to tax the property or income as such* and *to measure a legitimate tax upon the privileges involved in the use thereof.* It is implicit in all that the thing taxed in form was in fact and reality the subject aimed at, and that any burden put upon the nontaxable subject by its use as a measure of value was fortuitous and incidental.********courts, in scrutinizing taxing acts like that here involved should be acute to distinguish between an exaction which in substance and reality is what it pretends to be, and a scheme to lay a tax upon a nontaxable subject by a deceptive use of words.*********On the one hand, the state is at liberty to tax a corporation with respect to doing of its business. On the other hand, the state cannot tax the income of the corporation derived from nontaxable securities." (pp. 628, 629, 630. Italics ours.)

It was shown in the *Macallen* case that the act in question had been amended for the express purpose of reaching the income from nontaxable securities. The conclusion of the Court was that "the amended act in substance and effect imposes a tax upon federal bonds and securities."

The underlying principle upon which these cases are decided is, therefore, in entire harmony with previous decisions of the Court.

The distinction between a tax upon property or income derived therefrom and an excise tax on the privilege of doing business or the franchise of a corporation is also well illustrated in the two cases already discussed which involved the royalties or income from patents and copyrights. In *Long v. Rockwood,*

supra, the tax was a direct tax on income which, in Massachusetts at least, is a property tax. In *Educational Films Corporation v. Ward, supra*, the tax was an excise on the corporate franchise, that is, the right to do business in a corporate capacity, measured by income.

If royalties from copyrights are to be regarded as federal instrumentalities, the first case correctly decided that such royalties were exempt from the income tax imposed. In the second case, it was also consistently held that these royalties whether instrumentalities of the United States or not could be included in income by which the franchise tax was measured.

VII

THAT THE TAX IS MEASURED BY GROSS RECEIPTS RATHER THAN BY NET INCOME DOES NOT CHANGE THE NATURE OF THE TAX OR MAKE IT A DIRECT TAX ON AN INSTRUMENTALITY OF THE UNITED STATES.

It is insisted that the *Educational Films Corporation* case, *supra*, is not controlling because in that case the tax was measured by net income, while in the instant case it is measured by gross receipts. Appellant relies on the case of *Northwestern Mut. Life Ins. Co. v. Wisconsin, supra*, in support of the proposition that under a state tax measured by gross receipts the income from Federal securities cannot be included. We have already discussed this case and have endeavored to show that the Court held the Wisconsin tax to be a direct tax on income rather than an excise tax on the franchise of the corporation. The Court did not hold that a franchise tax could not be measured by gross receipts though Mr. Justice McReynolds did re-

fer to the fact that the tax was upon gross receipts and not net income as it was in *Flint v. Stone Tracy Co., supra,* and stated that the distinction between the two was clear. But this was not the controlling factor in reaching the conclusion that "the statute undertook to impose a charge of 3% upon every dollar of interest received by the company from United States bonds". The learned Justice pointed out the difficulty in determining whether "the assessment must be regarded as a tax upon property or one on privileges or franchise of the corporation".

It must not be forgotten, that

> "When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government, or violating the guaranties of the Federal Constitution, the states have the attributes of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests."
>
> *Ohio Oil Co. v. Conway,* (1930), 281 *U. S.* 146, 74 *L. ed.* 775.
>
> "The power of taxation is a fundamental and imperious necessity of all governments, not to be restricted by mere legal fictions."
>
> *Tyler v. United States,* (1930), 281 *U. S.* 497, 74 *L. ed.* 991.
> (Both quotations from sylibi in Lawyers Edition).

No one would question the right of a state to impose a franchise tax on corporations of its creation, or a privilege or license tax upon doing business within its borders. These are legitimate subjects of state taxation generally, well nigh universally, adopted to supplement revenues derived from the direct taxation of

property and income. In the measurement of these taxes the state is unrestricted. In the case of *Home Ins. Co. v. New York, supra,* the tax under consideration was upon the "corporate franchise or business of the corporation," that is, "the right of doing business in a corporate capacity." Mr. Justice Field, who delivered the opinion, declared:

> "The granting of such right or privilege rests entirely in the discretion of the state, and of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the state each year or month, *or a specific portion of its gross receipts or of the profits of its business,* or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the state may deem best to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows." (Italics ours.)

There are a number of cases in which it has been held that "a state can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom."

> *East Ohio Gas Co. v. Tax Commission of Ohio,* (1931), 283 *U. S.* 465, 75 *L. ed.* 1171, *and cases cited.*

An examination of these cases, we believe, will show that in all of them the tax was laid, either ex-

pressly or by implication, on the gross receipts *as such.* While the tax may have been denominated a franchise tax, it was held to be a tax on engaging in interstate commerce and amounted to a regulation of that commerce, and was therefore beyond the power of the taxing state.

N. J. Bell Tel. Co. v. State Board of Taxes, (1930) 280 *U. S.* 338, 74 *L. ed.* 463.

The right of a state to tax the gross receipts of an interstate carrier in lieu of a tax on its property, including its franchise, and its value as a part of a system, is well established.

Cudahy Pkg. Co. v. Minnesota, (1918), 246 *U. S.* 450, 62 *L. ed.* 827.

United States Express Co. v. Minnesota, (1912), 223 *U. S.* 335, 56 *L. ed.* 459.

"A taxing act which requires payment of a certain percentage of the gross earnings of an interstate carrier, but which practically imposes no more than the ordinary charge upon local property, may be sustained.*********The power to tax proprety necessary to conduct interstate commerce has been often upheld; and without doubt the states by apt enactments may tax the ordinary property, franchises, or business of their own corporations."

Northwestern Mut. Life Ins. Co. v. Wisconsin, supra.

Fifty years ago, in a case involving a state tax on railroad gross receipts, it was held:

"It is not to be questioned that the states may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent

of its exercise; nor is it deniable that *gross receipts may be a measure of proximate value*, or, if not, at least of the extent of enjoyment. If the tax be, in fact, laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise." (Italics ours.)

Phila. & Reading R. Co. v. Pennsylvania, (1873), 15 *Wall.* 284, 21 *L. ed.* 164, 169.

A state has no right to tax or otherwise burden interstate commerce. Therefore, a tax which has the effect of imposing a direct burden on such commerce is unconstitutional. But where the tax is imposed on a subject which is within the state's jurisdiction and taxing power, the state is not restricted in the means which it may employ, and it may measure the tax by any method which it chooses to adopt.

"While a state may not use its taxing power to regulate or burden interstate commerce, a state excise tax which affects such commerce not directly, but only incidentally and remotely, may be entirely valid, where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights."

Hump Hairpin Co. v. Emmerson, (1922), 258 *U. S.* 290, 66 *L. ed.* 622.

The validity of the tax depends not upon the *method adopted for its measurement*, but upon the *subject on which it is imposed*. If that subject be within the taxing power of the state the tax is upheld, although the measure may be the gross amount of nontaxable subjects.

A state inheritance or legacy tax is valid although

measured by the value of federal securities which are transmitted .

Plumber v. Coler, (1900), 178 *U. S.* 115, 44 *L. ed.* 998.
Orr v. Gilman, (1902), 183 *U. S.* 278, 46 *L. ed.* 196.
Blodgett v. Silberman, (1928), 277 *U. S.* 1, 72 *L. ed.* 749.

Indeed, an inheritance tax may be levied by a state upon a bequest to the United States.

United States v. Perkins, (1896), 163 *U. S.* 625, 41 *L. ed.* 287.

And by the United States on a bequest to a municipality.

Snyder v. Bettman, (1903), 190 *U. S.* 249, 47 *L. ed.* 1035.

The Georgia statute imposes a tax upon doing business. It may very well be that it would be invalid if enforced against an interstate carrier, because the very business engaged in is one which is beyond the power of the state to regulate. The business of appellant is not withdrawn from the jurisdiction of the state as is interstate commerce. Exemption is claimed on an entirely different ground. The commerce cases, therefore, can have but slight application.

VIII

THE TAX IN QUESTION IN FORM, EFFECT, AND OPERATION IS WHAT IT PURPORTS TO BE,—A BUSINESS TAX, AN EXCISE ON THE PRIVILEGE OF ENGAGING IN BUSINESS WITHIN THE STATE. THERE WAS NO PURPOSE TO TAX INSTRUMENTALITIES OF THE UNITED STATES.

The most careful reading of the act, in our opinion, will fail to disclose any purpose other than that plainly expressed in the title as follows:

> "An Act to Provide for the Raising of Public Revenue by a Tax upon the Privilege of Engaging in certain occupations and by a tax upon Certain Business and Commercial Transactions and Enterprises."

Over and over again the act refers to "doing business" or "continuing to do business" as the thing taxed. The amount of the tax is measured by the gross receipts of the particular business engaged in. Far from there being any covert design or purpose to impose a direct tax on securities or other instrumentalities of the federal government, or to tax exports or interstate commerce which are exempt from state taxation, it was expressly provided in section 7 of the act:

> "There shall be excepted from the receipts of all persons and/or companies taxed under this Act any amount that may be derived from the business or income of any such person or companies as the State of Georgia is prohibited from taxing under the Constitution of the United States of America."

Whether a state tax contravenes rights secured by the Federal Constitution "must depend not upon any mere consideration of form, construction or definition, but upon the practical operation and effect of the tax imposed."

> *Shaffer v. Carter*, (1919), 252 *U. S.* 37, 64 *L. ed.* 445.

In this case the Court, speaking through Mr. Justice Pitney, laid down broadly the principles upon which the right of the states to tax is based, saying:

"In our system of government the states have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property, and business transactions within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses. Certainly they are not restricted to property taxation, nor to any particular form of excises.**********

"The rights of the several states to exercise the widest liberty with respect to the imposition of internal taxes always has been recognized in the decisions of this court. In M'Culloch v. Maryland, 4 Wheat. 316, while denying their power to impose a tax upon any of the operations of the Federal government, Mr. Chief Justice Marshall, speaking for the court, conceded (pp. 428, 429) that the states have full power to tax their own people and their own property, and also that the power is not confined to the people and property of a state, but may be exercised upon every object brought within its jurisdiction, saying: 'It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation,' etc." (pp. 50, 51).

It was observed by the Chief Justice, then Mr. Justice Hughes, that

"We have recently had occasion (Baltic Min. Co. v. Mass. 231 U. S. 68, 83) to emphasize the necessary caution that every case involving the validity of a tax must be decided upon its own facts, and if the tax purports to be laid on

a subject within the taxing power of the state it is not to be condemned by the application of any artificial rule but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."

Kansas City etc. Co. v. Kansas, (1916), 240 *U. S.* 227, 233, 60 *L. ed.* 617, 619.

The right of a state to impose a tax on all persons, natural or artificial, who engage in any character of business within the state will hardly be questioned for, as the Court has said:

"Nothing can be more certain in legal decisions than that the privileges and franchises of a private corporation, all trades and avocations by which the citizens acquire a livelihood, may be taxed by a state for the support of the state government."

Society for Sav. v. Coite, 6 *Wall.* 594, 607, 18 *L. ed.* 897, 902.

In the *Educational Films Corporation* case it was argued that "there is no logical distinction between a tax laid on a proper object of taxation, measured by a subject-matter which is immune, and a tax of like amount imposed directly on the latter." The argument was answered by the Court, speaking through Mr. Justice Stone, who said:

"But it may be said with greater force that there is a logical and practical distinction between a tax laid directly upon all of any class of government instrumentalities, which the Constitution impliedly forbids, and a tax such as the present which can in no case have any incidence, unless the taxpayer enjoys a privilege which is a proper object of taxation, and which would not

be open to question if its amount were arrived at by any other non-discriminatory method."

And the Court said further in that case:

> "This court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government." (pp. 391, 392).

Keeping in mind the end sought by the principle of immunity of governmental instrumentalities from taxation, and that the purpose is the preservation to each government within its own sphere of the freedom to carry on those functions committed to it by the Constitution without undue interference by the other, can it be said that a state excise tax on the privilege of doing business within a state, applicable to all alike who are engaged in such business, measured by the gross receipts in excess of a substantial exemption, hampers, impedes, or imposes a burden upon the government of the United States in the discharge of any governmental function because there may be included within the measure of the tax receipts from royalties from patents or copyrights? Can it be said that the present tax, "viewed in the light of actualities imposes any such real or direct burden on the federal government as to call for the application of a different rule" from that laid down in the *Educational Films Corporation* case?

The income tax challenged in *Macallen Co. v. Massachusetts, supra,* was purposely and designedly aimed at income on bonds of the United States. It cannot be said that the tax involved in the instant case

was intended to subject copyrights or the royalties therefrom.

> "That the royalties play some part in the measure of the tax is the result of the application of the general language of the statute to particular circumstances to which the statute makes no specific reference."
>
> *Educational Films Corp. v. Ward, supra.*

> "A tax may very well be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them."
>
> *Miller v. Milwaukee,* (1927), 272 *U. S.* 713, 71 *L. Ed.* 487.

If this is true with reference to bonds of the United States certainly it is true as to copyrights and patents and the royalties therefrom, which, if they can rightly be regarded as instrumentalities of the government at all are only such in a qualified sense, not being necessary to the conduct of any essential governmental function, being granted for the benefit of the individual author or inventor and constituting his personal property.

IX

IN CONCLUSION, we respectfully insist, First: That the royalties from the copyrights owned by appellant are not such instrumentalities of the federal government as are immune from state taxation; and,

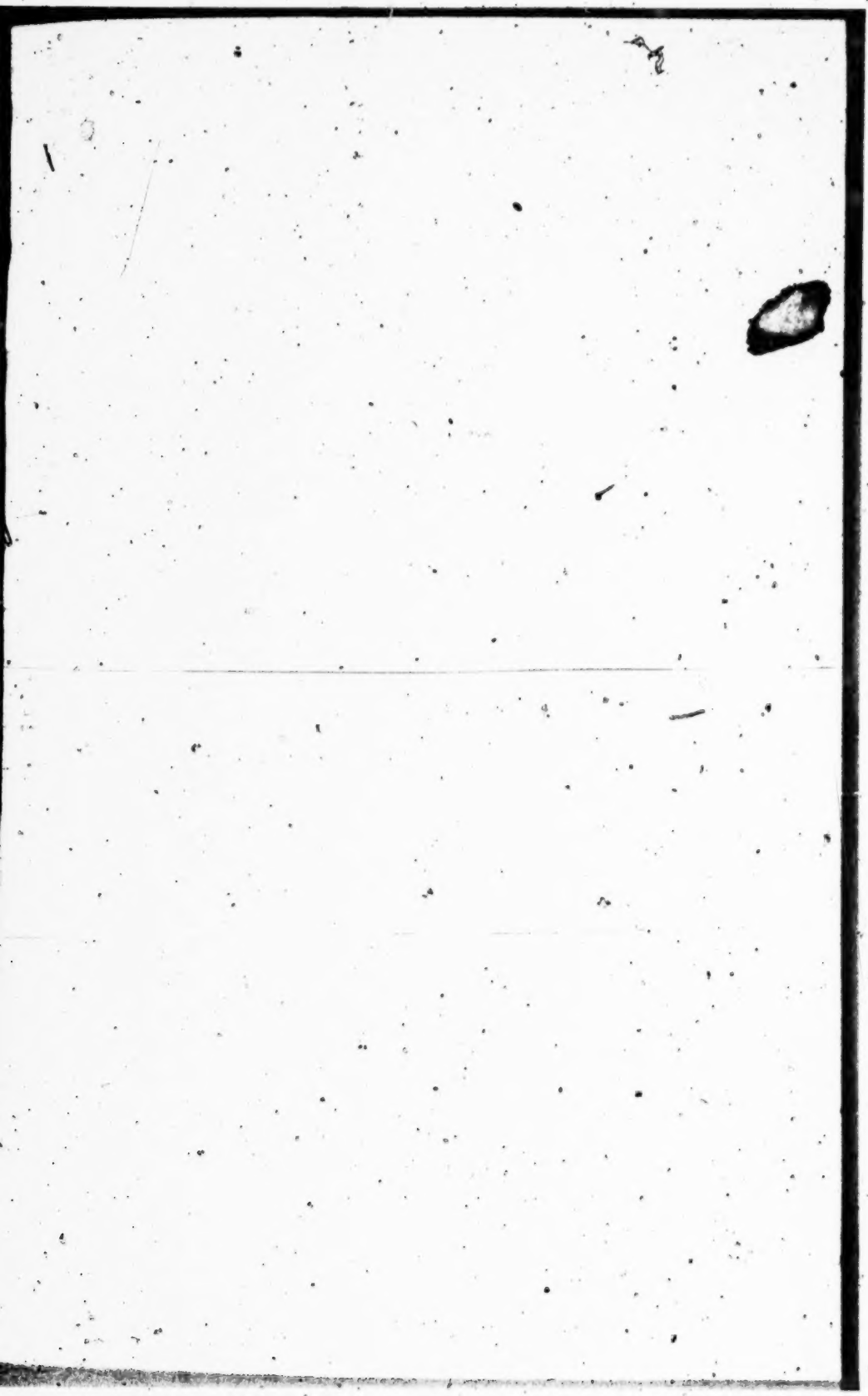
Second: That even if such royalties are considered as federal instrumentalities, the Georgia excise tax on "doing business" in the state, measured by gross

receipts, is valid, although the measure includes such royalties; and the judgment of the Supreme Court of Georgia should be affirmed upon both grounds.

Respectfully submitted,

GEORGE M. NAPIER,
Attorney General of Georgia.
ORVILLE A. PARK,
HARRY S. STROZIER,
J. A. SMITH,
Solicitors for Appellee.

ORVILLE A. PARK,
Of Counsel.



SUPREME COURT OF THE UNITED STATES.

No. 118.—October Term, 1931.

Fox Film Corporation, Appellant, *vs.* Paul H. Doyal, et al., Members of the State Revenue Commission.	Appeal from the Supreme Court of the State of Georgia.

[May 16, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Appellant, a New York corporation which is engaged within the State of Georgia in the business of licensing copyrighted motion pictures, brought this suit to restrain the collection of the state tax upon the gross receipts of royalties under such licenses. The tax was challenged upon the ground that copyrights are instrumentalities of the United States. On demurrer, the suit was dismissed, and the Supreme Court of the State, the Justices being equally divided in opinion, affirmed the judgment. 172 Ga. 403. The case comes here on appeal.

The Gross Receipts Tax Act (Georgia Laws, 1929, p. 103), describes the tax as laid "upon the privilege of engaging in certain occupations" and "upon certain business and commercial transactions and enterprises". As the tax is measured by gross receipts, the case is not ruled by *Educational Films Corporation* v. *Ward*, 282 U. S. 379, where the tax was based upon the net income of the corporation. Appellant insists, and we think rightly, that the operation of the statute here in question, in its application to gross receipts, is to impose a direct charge upon the royalties. *Northwestern Mutual Life Insurance Company* v. *Wisconsin*, 275 U. S. 136, 141. See, also, *Crew Levick Company* v. *Pennsylvania*, 245 U. S. 292, 297; *United States Glue Company* v. *Oak Creek*, 247 U. S. 321, 328, 329; *New Jersey Bell Telephone Company* v. *State Board*, 280 U. S. 338, 346. The question is thus presented whether copyrights are to be deemed instrumentalities of the Federal Government and hence immune from state taxation.

The Constitution empowers the Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries". Art. I, sec. 8, par. 8. The production to which the protection of copyright may be accorded is the property of the author and not of the United States. But the copyright is the creature of the Federal statute passed in the exercise of the power vested in the Congress. As this Court has repeatedly said, the Congress did not sanction an existing right but created a new one. *Wheaton* v. *Peters*, 8 Pet. 591, 661; *American Tobacco Company* v. *Werckmeister*, 207 U. S. 284, 291; *Globe Newspaper Company* v. *Walker*, 210 U. S. 356, 362; *Caliga* v. *Inter Ocean Newspaper*, 215 U. S. 182, 188. The statute confers upon the author after publication the exclusive right for a limited period to multiply and vend copies and to engage in the other activities described by the statute in relation to the subject matter. U. S. C., Tit. 17. In creating this right, the Congress did not reserve to the United States any interest in the production itself, or in the copyright, or in the profits that may be derived from its use. Nor did the Congress provide that the right, or the gains from its exercise, should be free of tax. The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property. Compare *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 422, 424. The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors. A copyright, like a patent, is "at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects." *Kendall* v. *Winsor*, 21 How. 327, 328; *Grant* v. *Raymond*, 6 Pet. 218, 241, 242.

The principle of the immunity from state taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from Federal taxation—essential to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government (*McCulloch* v. *Maryland*, 4 Wheat. 316, 436), and

the immunity does not extend "to anything lying outside or beyond governmental functions and their exertions". *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 576, 579. Where the immunity exists, it is absolute, resting upon an "entire absence of power" (*Johnson* v. *Maryland*, 254 U. S. 51, 55, 56), but it does not exist "where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government". *Willcuts* v. *Bunn*, 282 U. S. 216, 225.

In this instance, the mere fact that a copyright is property derived from a grant by the United States is insufficient to support the claim of exemption. Nor does the fact that the grant is made in furtherance of a governmental policy of the United States, and because of the benefits which are deemed to accrue to the public in the execution of that policy, furnish ground for immunity. The disposition by the Government of public lands, in order to advance the general interest by promoting settlement, illustrates the principle and its limitation. The property of the United States is not subject to state taxation (*Van Brocklin* v. *Tennessee*, 117 U. S. 151) but the property of individual owners, although derived from the United States under its public land laws, may be taxed. The power to tax exists as soon as the ownership is changed. *Witherspoon* v. *Duncan*, 4 Wall. 210, 219. Though the legal title remains in the Government, if the proceedings have reached the point where nothing more remains to be done by the entryman and the Government no longer has any beneficial interest in the land and does not exclude the entryman from the use of it, he is regarded as the beneficial owner and the land as subject to taxation. *Bothwell* v. *Bingham County*, 237 U. S. 642, 647.[1] Again, the possessory right of a qualified locator after discovery of minerals is a property right in the full sense, unaffected by the fact that the paramount title to the land is in the United States, and such interest from early times has been held to be vendible, inheritable, and taxable. *Forbes* v. *Gracey*, 94 U. S. 762, 766, 767;

[1]See, also, Carroll *v.* Safford, 3 How. 441, 461; Tucker *v.* Ferguson, 22 Wall. 527, 572; Wisconsin Railroad Co. *v.* Price County, 133 U. S. 496, 505; Irwin *v.* Wright, 258 U. S. 219, 228, 229; New Brunswick *v.* United States, 276 U. S. 547, 556; Exchange Trust Company *v.* Drainage District, 278 U. S. 421, 425; Group No. 1 Oil Corporation *v.* Bass, 283 U. S. 279, 282.